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LAWYERS AND INDIANS

Douglas Sanders
December 16, 1978.

Lawyers and Indians

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1978

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The long term goal of Indian and Inuit groups has been distinct group survival. We know little of what today would be called their 'survival strategies'. We know that active resistance was a strategy in the earlier stages of Canadian history, but ceased to be feasible. In this century Indian and Inuit groups have had to respond to increased Euro-Canadian control over their lives, a control aimed at achieving assimilation. Because the government programs were underfunded and poorly staffed, Indian and Inuit groups were able to resist assimilation by various forms of non-cooperation. But there were high social and economic costs to their mix of accommodation and passive resistance. Additionally, after the second World War Euro-Canadians began to take a new interest in Indians and Inuit, leaving less room for avoidance techniques. In the years after the second World War much of the Indian leadership adopted

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non-Indian norm of integration, at least to the extent of seeking equality and valuing achievement in non-Indian society. But this period was short lived and native leadership returned to the more constant goal of distinct group survival by stressing special group rights. Indian and Inuit groups wanted access to the material success of post-war Canada, but not at the price of assimilation.

There have been some fairly clear examples of results from working within the system. When negotiations with the Quebec government over the James Bay hydro-electric project seemed to be going nowhere, the Cree and Inuit of James Bay took the provincial government to court and obtained an injunction stopping construction. The injunction was rapidly lifted on appeal, but the Province agreed to negotiations and eventually to a settlement. Since then, there have been negotiated settelements of claims in Northern Manitoba, Saskatchewan and a draft settlement in the Mackenzie Delta area of the Northwest Territories.

There have also been some fairly clear examples of results from militant action. In 1973 the Minister of Indian Affairs endorsed a position paper of the National Indian Brotherhood entitled "Indian Control of Indian Education." That shift in governmental policy can be traced to the occupation of Blue Quills school, the northeastern Alberta school boycott and the occupation of the Indian Affairs office in Edmonton, events which occurred between 1969 and 1972. The establishment of a joint negotiating structure between the National Indian Brotherhood and the federal cabinet can be traced to September, 1974, when an Indian-R.C.M.P. confrontation on Parliament Hill

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stole newspaper headlines from the government's speech from the throne. In 1975, after numerous Indian demonstrations, the government of British Columbia agreed to work out a settlement of the "cut-off" lands claim in that province. The government acknowledged the significance of the demonstrations by requiring the Indians to sign an agreement stating that they would stop demonstrating on the issue.

One way of working within the system is to use lawyers and legal arguments. The assertion of legal claims and special rights dominates the political rhetoric of Indian and Inuit groups. In contrast, arguments based on poverty and deprivation are relatively unimportant. No other group in Canada presents their position in relation to the dominant society so completely in the form of assertions of legal rights. Why is this so? Does it reflect a basic tactical decision to work within the system?

Schwimmer describes a pattern of Indian "symbolic competition" where native groups challenge Euro-Canadians, but on a symbolic level. This avoids a direct confrontation where the superior power of the Euro-Canadians would result in an Indian defeat. Symbolic competition can give symbolic victories. It can sustain pride and maintain distance. It avoids accepting an inferior stereotyping by attacking Euro-Canadian society as violating its own norms of morality, justice and legality. This is the tactic of a politically weak group, but a group which cannot avoid interaction with agents of the dominant society. Euro-Canadians who seek to organize or educate or evangelize find that the Indians and Inuit have completely different questions that they want to discuss, questions which challenge the fundamental legitimacy of the non-Indian presence. This is an alternative to both working within the system and militant action. It is a special form of passive resistance and

a tactic unfamiliar to Euro-Canadians.

To the extent that Indian and Inuit legal claims are part of a process of symbolic competition, their substantive legal content is, in fact, not to be tested. If it were to be tested, then real political defeat would be possible. Even a vindication of a native legal claim poses problems, for it requires a shift from symbolic competition into the much different world of negotiation and settlement. For this reason certain Indian figures actually resist a settlement of claims. For this reason certain non-Indian political figures advocate settlements, hoping they will end the process of symbolic competition and, in that way, help to integrate native groups into European style political activity. In any case, it is clear that the use of legal arguments by Indian and Inuit groups does not represent a clear choice to work within the system.

LAW AND INDIANS

What is the substantive legal content of native claims? Indian and Inuit groups in Canada and the United States argue that the colonial legal system did not play by its own ground-rules in taking control of North America. This argument accepts the legal context established by colonialism and suggests the possibility of successful litigation within the context of that legal system. In asserting this position it is crucial to play on the inconsistencies or contradictions within colonial history.

The first inconsistency we can note is that between treaty and non-treaty areas. In Canada approximately half the land mass is covered by Indian

treaties. In the other half of Canada the English and French took control of the land without explicit recognition of Indian title. The major claims of the last ten years have involved assertions of aboriginal title in non-treaty areas of Canada.

The second inconsistency involves the treaties. Government entered into the treaties with pomp and solemn promises, then later regarded them as insignificant both in terms of law and policy. In a sense Indians had a choice to see the treaties as an exercise in fraud or as a recognition of rights. Whites are often quick to label the treaties as "legalized theft". Indians, desparate to have 'rights' to assert against a disinterested dominant society, have almost always chosen to see them as a source of rights. There are substantial differences between the Indian and white view of the meaning of the treaty documents. The legal system tends to see the issue of treaty promises as the choice between a literal or a liberal interpretation of treaty terms. But the treaties, read literally or liberally, give the Indians very little and, in that, contradict the actions of the government when the treaties were negotiated and signed. Indians see the issue differently. They argue that treaty terms are to be understood conceptually. The promise of a 'medicine chest" means a right to free hospitalization, drugs and doctors' services. The promise of a school means a right to free education. The promise of agricultural equipment means a right to economic development assistance. The use of treaties and the recognition of chiefs and head-men was a recognition of Indian bands as Indian governments, retaining elements of sovereignty and only entering into a protectorate relationship with the Crown.

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Some of the most basic questions of Indian rights in Canada were never litigated until after the second World War. Indians were too marginal and too poor to hire lawyers and finance court cases. But there were enough cases to establish a dismal judicial record. A pre-confederation decision rejected the notion of Indian rights to reserve lands on the basis that the common law could not be part civilized and part savage. In 1928 a Nova Scotia court ruled that Indian tribes were incapable of entering into treaty. In 1934 an Ontario court ruled that the federal government was not bound by the Indian Act. This meant that the government could allocate Indian reserve land without regard to the land management rules enacted by Parliament. In the 1960's the Supreme Court of Canada ruled that treaty protected hunting rights could be ended by general federal legislation. But the only question they discussed was whether the duck was a wild duck or a tame duck. On the basis of past performance most lawyers would have predicted little from Canadian courts in Indian rights cases.

In spite of the uninspiring precedents, a modern series of Indian rights cases began in the 1960's. They were initiated, generally, outside the Indian organizations and involved lawyers with a streak of activism in their blood. What have been the results? Indian hunting rights have been upheld in some cases and rejected in others. The status of reserves as federal enclaves has been upheld in some cases and rejected in others. Indian tax exemptions have been upheld in some cases and rejected in others. The most dramatic series of cases have involved aboriginal title claims in non-treaty areas of Canada. In the Calder case in 1973 the Supreme Court of Canada divided equally on the question whether the Nishga tribe of north-western

British Columbia still retained legal title to their traditional lands. That decision, unquestionably one of the most radical decisions of the Supreme Court of Canada, gave tremendous impetus to aboriginal title claims in Canada. In September, 1973, Mr.Justice Morrow of the Northwest Territories Supreme Court ruled that Indians were entitled to file a caveat against ungranted lands claiming aboriginal rights. In November, 1973, Mr.Justice Malouf of the Quebec Superior Court issued an injunction stopping the massive James Bay hydro-electric project on the basis of unextinguished Indian and Inuit land rights. The latter two decisions were reversed on appeal and the Supreme Court of Canada has skirted the aboriginal title issue in more recent cases. But the courts have proven more sympathetic to Indian claims than most informed observers would have predicted. The question of the legal existence of aboriginal title in non-treaty areas continues to be an open question. In the meantime, negotiations for further out-of-court settlements are going on in a few parts of Canada.

LAWYERS FOR INDIANS

The use of legal arguments may not indicate that Indians and Inuit have chosen to work within the system, but, perhaps, the decision to hire lawyers does represent such a choice. The answer is not simple, for lawyers come in different shapes and colours. The lawyers who have been involved with Indian and Inuit questions in Canada can be grouped into three general categories: (a) the 'publicists', (b) the 'newcomers' and (c) the 'established lawyers'.

(a) the 'publicists'

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For the 'publicists' Indian issues were a cause, a hobby or a charity. While the work may have produced income, it usually did not constitute a major part of the lawyer's practice.

A few of the 'publicists' were decidedly odd. Arthur O'Meara was a lawyer turned clergyman who came to British Columbia early in this century. He took on Indian aboriginal title claims with a passion, authored pamphlets on the issue and founded a "Friends of the Indians" organization. He was seen by many whites as an outside agitator, busy stirring up the local and otherwise peaceful natives. O'Meara was not typical of the 'publicists'. While he employed legal arguments he was never a member of the bar in British Columbia and handled no court cases.

The Iroquois communities in southern Ontario and southern Quebec were some of the first Canadian Indian groups to use lawyers. Perhaps the most exotic was Gobashy, an Egyptian international lawyer living in New York City who became involved in the St.Lawrence Seaway expropriation disputes. Gobashy outlined a semi-legal argument in a slim volume entitled "The Caughnawaga Indians and the St.Lawrence Seaway." He also worked to get a hearing before the International Court of Justice in the Hague for the Confederacy faction on the Six Nations Reserve, to permit them to assert sovereignty against Canada. Another odd example was the involvement of Frank R.Scott, the academic and constitutional expert, in the St.Lawrence seaway litigation and that grandfather of all Indian cases, the Oka dispute.

The more notable examples of 'publicists' were lawyers who maintained

a private practice as counsel. Malcom Montgomery of Toronto has worked for the Confederacy faction on the Six Nations reserve. He handled two cases in which the Confederacy sought recognition as the valid governing body of the reserve. The arguments involved in assertion of traditional sovereignty against the provisions of the Indian Act. In the Northwest Territories Judge Sissons was a 'publicist' on the bench and was responsible for involving William Morrow, a successful counsel in practice in Edmonton, in many of the fascinating northern cases. In Vancouver Harry Rankin, the well-known radical, was involved in the second Fred Quilt inquest, which he came to see as symbolic of his career. In British Columbia Thomas Berger combined a political career with counsel work, including major Indian rights cases.

Three things stand out about the 'publicists': (1) they were the first lawyers on the Indian scene, (2) they were involved in claims with high symbolic and historical value (and, in contrast, not with questions involving the Indian Act, the Department of Indian Affairs or the reserve system) and (3) in their ranks are the lawyers whose cases mark the emergence of Indian claims in the last twenty years. The initial cases on hunting and fishing rights and aboriginal title were taken by William Morrow, B.J. McKinnon and Thomas Berger. All were well known for their counsel work. Presently all three are judges, which illustrates an interesting point. Indian work has never been disreputable. A lawyer told the writer in 1973 that he was doing work at cost for one of the Indian organizations because he wanted a judgeship. He thought it would look good on his record. Indian work, today, is probably more respectable than work for trade unions and probably always has been. The key 'publicists' were part of a successful elite of trial lawyers. They knew the courts well and were used to the gamble

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of the litigation process. Their contact with Indians was limited, as was their contact with other clients. They were used to controlling the conduct of their cases. To them the Indian cases were interesting legal questions. They believed the cases had social significance. But their involvement with the Indian client did not go beyond the court cases.

How did lawyers in this category get hired? While a great deal of self-selection by the lawyers was involved, neither self-selection nor client-selection is a sufficient explanation of the hiring process. A combination of special circumstances seems to have been involved in each case.

(b) the 'newcomers'

In the late 1960's government grants began for Indian political organizations. The National Indian Brotherhood was officially founded in the summer of 1969. Within a couple of years a pattern of status Indian organizations had been established in each province and territory. Parallel structures were created for non-status Indians and the Inuit. While some changes were undoubtedly coming in any case, the government funding dramatically altered the Indian political scene. The existence of funded native organizations, in turn, affected the involvement of lawyers with Indian issues.

Lawyers were the first category of consultants hired by the Indian and Inuit organizations. The groups did not know how to hire lawyers. This was a problem they shared with most Canadians, but their greater marginality

within Canadian society made the problem more difficult for them. They hired lawyers who, for some reason or other, were already in contact with Indian groups. The connections were never completely initiated by the Indians. At times they were substantially initiated by the 'newcomer' lawyer. As with the 'publicists' the process of hiring was a combination of self-selection and client-selection, though an element of client-selection was always necessary.

The 'newcomers' who were hired were marginal within the legal profession. They were all young. Normally they had not established an expertise in any other field of law before entering the Indian area. They tended to dress casually. They were, almost without exception, not members of law firms. They did not maintain the independence from the client which the legal profession sees as the hallmark of the professional relationship. They were the only lawyers to go on staff with the organizations, though not all of them have had staff positions. They frequently gave political and tactical advice, a pattern not limited to lawyers acting for Indians. They often were legal researchers and part of the support staff at Indian meetings.

The established lawyer assumes a patron role to the client. He will act for the client, but the lawyer-client relationship will not be one between status-equals. In contrast the 'newcomer' lawyers tried to minimize the status difference and saw the Indian client as patron. Many of the roles assumed by the 'newcomers' were dependant upon personal friendships and a degree of individual integration into the Indian political organizations.

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Some of the 'newcomer' lawyers have stayed on the Indian scene. Their marginality within the profession has tended to continue. Generally they have not joined or formed firms. While they were the dominant group of advisors to Indian organizations for a period, their relative influence has declined and, in retrospect, their impact on the political lines taken by Indian organizations seems insignificant.

(a) the 'established lawyers'.

The longest history of Indian use of 'established lawyers' within Canada appears to be in Quebec. Ian Watson, presently a Liberal member of Parliament, acted for the Caughnawaga Indian Band in Montreal. When he left for Ottawa, the band went to a lawyer they knew in a large, well-connected Montreal firm. The lawyer, James O'Reilly, while young, had an established practice in estate planning. The work for the Caughnawaga Band led to work for the Indians of Quebec Association and, in turn, to the litigation against the James Bay hydro-electric project. But the firm acted for the Quebec government and the James Bay Development Corporation, prompting O'Reilly to establish his own law firm. This was the first Canadian firm to be established around Indian legal work. There are two or three others today.

Certain other bands were in an economic position to hire lawyers for reserve development work. The Musqueam band in Vancouver have used a number of lawyers, including the present mayor of Vancouver and the present Attorney-General of British Columbia. They presently use one of the largest downtown firms in Vancouver.

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The use of 'established lawyers' began with bands located in or near metropolitan centres. Only later did the Indian organizations begin to move from 'newcomer' lawyers to 'established lawyers'. In the winter of 1972-3 the Indian Association of Alberta dropped the lawyer who had been with them since the founding days of the association and sought advice from well placed people for the names of lawyers who might replace him. This led to the hiring of a lawyer, practicing with a firm, who was already professionally established. The Northern Quebec Inuit Association also changed lawyers and hired an equivalent practitioner in Montreal around 1975. In this way lawyers who had backgrounds in estate planning, corporate litigation and the negotiation of international commercial contracts became involved in Indian legal work.

The 'established lawyers', unlike the 'newcomers', never went on staff with the Indian organizations. They preferred the more orthodox pattern of serving their Indian and Inuit clients from their law firms. They were often prepared to become highly involved with their Indian-organizational clients, but in the same way that they would become involved with major non-Indian institutional clients. The involvement would never, as with the 'newcomers', involve dropping any of the characteristics of the lawyers role. The 'established lawyers' were also, in general, lawyers sought out by the Indian clients and hired on an Indian initiative. In that the initiation of the relationship differed from that with 'publicists' and 'newcomers'.

(d) the choice of lawyers.

Since the Indian and Inuit organizations did not hire 'publicists',

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the fact that the 'publicists' took Indian issues to court did not represent an Indian or Inuit decision to work within the system. 'Newcomer' lawyers were hired by a combination of self-selection and client-selection. They generally agreed with the Indian and Inuit distrust of litigation and negotiation. Hiring them was not a commitment to working within the system. 'Established lawyers' believed in working within the system by the use of a full mix of tactics. They could even appreciate the functionality of occasional militancy. To the extent that 'established lawyers' were hired and used, Indian and Inuit groups had made a decision to work within the system.

GOVERNMENT LAWYERS

The Department of Indian Affairs has a number of lawyers in administrative positions within the Department. For legal advice they rely on a group of Department of Justice lawyers working within the Department of Indian Affairs or in the Department of Justice itself. Any court appearances will be handled by lawyers directly from the Department of Justice. The Department of Justice are the lawyers to all government departments. The departments assert that there is a solicitor-client relationship and the Department of Indian Affairs refuses to disclose the legal opinions they receive to the Indians affected by them. In practice a Department of Justice opinion is supposed to govern the activities of the Department receiving it.

In the 1960's the Department of Indian Affairs commissioned a study of the contemporary situation of Indians in Canada. Professor Kenneth

Lysyk, then teaching constitutional law at the University of British Columbia, was included in the study team. Lysyk's work represented the first serious academic study of the legal situation of Indian and Inuit people in Canada. The whole report focused on administrative reform and did not deal with the question of Indian claims. It established Lysyk as a pioneer in the area and the Department of Indian Affairs consulted him occasionally in the years after the report was published.

In 1969 the federal government released a white paper on Indian policy, generally rejecting Indian claims and advocating a termination of federal responsibility. Recent research has shown that the Department of Justice played a decisive role on the question of aboriginal title claims. Their flat statement that such claims were not recognised in Canadian law was determinative of that part of the white paper. Until quite close to the final presentation of the paper a more accomodative position on claims was planned to balance the terminationist character of the document. The end result was a serious political embarassment for the federal government.

The Berger inquiry into the proposed Mackenzie Valley natural gas pipeline dominated Canadian native issues from 1975 to 1977. Berger was the 'publicist' lawyer who had handled Indian rights cases in British Columbia in the 1960's, including the crucial Calder case. Since that time he had been appointed to the bench. The Berger inquiry held hearings in every settlement in the Mackenzie District of the Northwest Territories. Interestingly, the work of organizing the community hearings, a vital part of the

of the Inquiry's strategy of operation, was entrusted to a legal academic, Michael Jackson, from the University of British Columbia. Lawyers were the most visible actors in the inquiry, other than the Indian people themselves. In the report of the Inquiry, the central recommendations focused on the aboriginal title claim.

While the federal government have always had some lawyers on staff concerned with Indian questions, provincial governments have had limited involvement with Indian legal questions. When provinces have had to respond to Indian rights issues they have normally retained a lawyer in private practice. Occasionally a particular staff lawyer in a provincial Attorney General's Department has become associated with Indian issues within the provincial structure. The lack of in-house expertise within provincial governments has often made it very difficult for Indian groups to deal with provincial governments.

INDIANS AS LAWYERS

In 1876 a provision was inserted in the Indian Act automatically enfranchising any Indian who obtained a university degree or who qualified as a lawyer. In 1880 the section was altered so that enfranchisement was not automatic, but depended upon a petition by the Indian. In 1920 the Indian Act was amended to add a controversial section permitting involuntary enfranchisement of Indians. This provision was dropped in 1922. The special section on Indians with university degrees or admitted to a bar was gone by 1927. In those years and well into the period after World War II, Indian status was seen as a constraint that would be given up by any Indians who

could succeed in non-Indian society. Becoming a lawyer and retaining Indian status were seen as inconsistent.

Andrew Paull, an Indian from the Squamish Band in North Vancouver, had a political career which spanned about forty years until his death in 1959. At the age of 15, in 1907, he began working in the Vancouver law office of Hugh St.Quentin Cayley, a lawyer with a mixed background which included journalism and political office. Paul never articled with Cayley, a fact "usually credited to his refusal to give up his Indian status..." In his testimony to the Special Joint Committee on the Indian Act in 1946, he stated:

> "I guess what they would call me is an Indian "lawyer without a ticket". I defend Indians in court from the juvenile right up to the Supreme Court. I just left British Columbia where I helped to defend three Indians on a murder charge.
> Q. Do you mean to say you attend in court as a barrister?
> A. No, I attend in court as a friend of the Indians.
> Q. As an interpreter?
> A. As an interpreter, and things like that.
> Q. Not as a solicitor?
> A. No, I am not a lawyer.

Paul appeared frequently, it seems, in the police courts in Vancouver and in other courts as well. The Queen's Bench Division of the New Brunswick Supreme Court heard him in an Indian fishing rights case "on behalf of the defendants as a friend of the Court and he ably assisted their counsel."

George Manuel, an Indian from the interior of British Columbia, worked with Andrew Paull in the North American Indian Brotherhood. The lawyer from the Brotherhood, Henry Castillio, hired Manuel as an investigator and translator for two to three years. In this period the Department of

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Indian Affairs paid the legal fees for Indians charged with any capital offence. Manuel assisted Castillio in these cases. To some extent George Manuel repeated the experience of Andrew Paull by working closely with a practicing lawyer before becoming a major Indian political figure. George Manuel never played the role of an "unlicenced lawyer", but brought a respect for lawyers to his role as head of the National Indian Brotherhood.

The first Indian to qualify as a lawyer may have been Norman Saylor, an Iroquois who became a member of the Quebec bar in 1935. He testified before the Special Joint Committee on the Indian Act in 1947 that he had been in practice since 1935 in Montreal and had been handling Indian legal issues. Norman Lickers, an Iroquois from the Six Nations reserve in Ontario was called to the bar in 1938. He was probably the first Indian member of the Ontario bar and was Counsel and Liaison Officer to the Special Joint Committee on the Indian Act. By 1969 there were three Indian lawyers in Canada, none of whom were working for Indian organizations or, particularly, handling Indian clients. None of the three were drawn into work for the Indian organizations which were funded by the federal government beginning in 1969.

In 1973 the College of Law at the University of Saskatchewan began a special pre-law summer program for native students, modelled on a program at the University of New Mexico. In the first three years thirty-seven native students successfully completed the summer program. In 1974 an Indian law students association was formed. In February, 1978, Indian

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lawyers and articling students formed the Canadian Indian Lawyers Association. By the fall of 1978 they estimated that thirty-five to forty people qualified for membership in the Association.

Law seems to have had a particular interest for Indian students. It is perhaps significant that both Noel Starblanket, the present head of the National Indian Brotherhood, and Harry Daniels, the present head of the Native Council of Canada, both planned to enter law school before being elected to head their national organizations. They both continue to speak of a law career as a future plan.

Native lawyers could seek careers with the native organizations, with government, or in private practice. Two, at present, have staff positions with native organizations. One has joined government as a prosecutor. Virtually all the rest are in private practice. In February, 1978, the Canadian Indian Lawyers Association discussed a first draft of this paper. Some members questioned whether Indian legal work would be as respectable for Indian lawyers as it has apparently been for non-Indian lawyers. They expressed a view that only if they did regular legal work would they be regarded as real lawyers. They felt that the political leadership of the native organizations might see them as potential competitors and prefer non-Indian lawyers for that reason. Some questioned whether Indians would have confidence in Indian lawyers because many Indians have a negative self-image. Two non-status lawyers feared that Indians would

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prefer non-Indian lawyers over Indian lawyers and status lawyers over non-status lawyers.

THE LAWYERS ROLE

The range of professional activity taken on by lawyers is very broad. That has been true in the work for Indian clients.

Lawyers tend to see litigation as a last resort. The Canadian courts are generally viewed as conservative. Indian leaders, like other political leaders, dislike litigation, preferring symbolic competition or practical compromise over the win or lose alternatives in the courts. These factors militate against litigation on Indian issues. Yet litigation was the major activity of the 'publicist' lawyers. In contrast 'newcomers' tended to agree with the Indian distrust of litigation. Established lawyers balanced litigation and negotiations in a manner presumably similar to the handling of non-Indian matters. This illustrates a common characteristic of 'publicists'. They were court-room lawyers and their role for Indians and other clients was generally limited to litigation. As with other counsel work, their decisions on legal strategy were not subject to client scrutiny and approval. Even more clearly than with the 'established lawyers' they were the patrons of the Indian client.

There seem some obvious examples of Indian organizations initiating major litigation. The three land claims cases of 1973, the Calder case, the Paulette case and the James Bay litigation, all had Indian organizational plaintiffs. But the Calder case was initiated by a small, self-reliant

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and prosperous tribe who had severed their political ties to other Indian groups. Their spokesman, Frank Calder, had been a member of the provincial legislature for many years. The conduct of the case was entrusted to their lawyer Thomas Berger. It was truly an exceptional situation. The Paulette case began when the Indian Brotherhood of the Northwest Territories sought to register a caveat against ungranted crown lands in the Mackenzie District of the Northwest Territories claiming aboriginal rights. The actual decision to convert that action into a court case was taken by the Registrar of land titles using statutory powers which enabled him to refer questions to a judge. The procedure was then controlled by Judge William Morrow, since the legislation directed him to hold an inquiry, rather than a trial. The 'newcomer' staff lawyer of the Brotherhood brought in three outside lawyers who assumed responsibility for major parts of the case. The appeals were handled by established lawyers in private practice. The James Bay litigation was initiated by the Indians of Quebec Association and by the Cree and Inuit of James Bay. The litigation occurred after negotiations with the province of Quebec had broken down and required the strong role of the Indian's lawyer, James O'Reilly.

With the exceptions of these major cases, the Indian organizations in Canada have not initiated litigation. They have taken over the conduct of hunting and fishing rights cases that have arisen from regular prosecutions. They have been forced to respond to cases involving the Canadian Bill of Rights and taxation. But generally they have not seen litigation as a regular part of their political strategy. It is therefore

logical, at least in retrospect, that the 'publicist' lawyers usually did not have Indian organizations as clients.

A second major activity of lawyers is negotiation in an adversary situation. The 'publicist' lawyers handled court cases but, almost without exception, were not involved in continuing negotiations with government. Indian organizations did not feel comfortable with such negotiations, an attitude (like that to litigation) generally shared by the 'newcomer' lawyers. The only major example of sustained negotiating and lobbying are on the part of 'established lawyers'. The examples beyond the James Bay situation, are so few that it is difficult to generalize.

A few limited comments can be made on the question of legal fees. The Department of Indian Affairs resisted the entry of lawyers onto the Indian scene for many years and prevented bands from paying legal fees out of band funds. They argued that bands would be exploited by unscrupulous lawyers. Lawyers argued that the Department feared losing its paternalistic control. When the Department began funding "consultation" meetings on the 1969 white paper, they included funding for Indian-chosen lawyers to attend the meetings. When the present pattern of funding of the organizations developed it was clear that any decision by the organizations to hire lawyers was fully in Indian hands.

The Department of Indian Affairs had an established policy of paying legal fees for Indians charged with capital offences. That policy was extended to the Indian hunting rights cases of the 1960's. When

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provincial legal aid plans came into existence, the Department withdrew from funding, though they paid for certain specific cases. They funded the interventions of the National Indian Brotherhood in the Bill of Rights cases in the early 1970's. They also funded the James Bay litigation, though on the basis of a loan against the proceeds of a future settlement.

The 'publicists' were active before provincial legal aid schemes would cover such litigation. Normally they did not have an Indian-organizational client able to pay their fees. For cases such as the hunting rights cases of the 1960's, there was no assurance of payment of fees until the Department of Indian Affairs decided to cover those costs. The self-reliant Nishga did not seek governmental funding and paid for the Calder case from church contributions and from their own funds. The financial uncertainties of the period did not prevent the litigation that did occur for the 'publicists' were not doing Indian work for the money. Some, probably, were never paid. This tradition carried into the 1970's when B.J.McKinnon, Peter de C.Corey and John Sopinka, all of Toronto, did free legal work for the Native Council of Canada, the Walpole Island Band and the Six Nations Confederacy, respectively.

The 'newcomers' came on the scene with the beginnings of federal funding of Indian organizations. They looked to the organizations for their income, but their financial expectations were modest, compared to the 'established lawyers'.

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The 'established lawyers' expected to be paid the same fees they charged other clients. Most Indians found the level of regular lawyer fees fairly startling. In 1969 and 1970 there was considerable talk about the fees charged by James O'Reilly which, as the fees of an 'established lawyer', were considerably higher than those of the 'newcomers'. Harold Cardinal, the Alberta Indian leader, was able to embarass the Indian lawyer William Wutunee by revealing that Wutunee had been paid $300.00 a day by the Department of Indian Affairs for two days of consultation on how to promote the controversial white paper of 1969. Supporting the white paper and working for the Department were scandalous in themselves, but the amount of the fees was the icing on the cake. Certain leaders, however, adjusted to the costs of 'established lawyers' and preferred to employ them.

One way of attacking Indian organizations has been to attack the groups lawyer as greedy and self-seeking. This has occurred in Quebec, the Yukon and Manitoba. In each case non-Indian politicians have raised the question of the income of a particular lawyer working for an Indian group. These were simply passing thrusts in a political process and never resulted in any investigation of the accusations.

THE PRESENT MIX

The era of the 'publicists' is gone, though occasional repetitions of the role are possible. When Clay Ruby of Toronto took on the Lavell case in the early 1970's he was clearly following the 'publicist' pattern. Paradoxically the status Indian organizations did not see the case as an Indian rights case and intervened against Ruby in the Supreme Court of Canada.

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It is possible to give examples of 'established lawyers' replacing 'newcomers' in certain specific situations. But it is clear that there is no general trend in that direction. Presently there is a mix of 'newcomers' and 'established lawyers' on the Indian scene and it appears that such a mix will continue. In some areas of Canada, notably Manitoba and Atlantic Canada, Indian organizations have had difficulty establishing relationships with any lawyers. In Ontario, where there is no single provincial Indian organization, there have been almost no 'established lawyers' on the Indian scene. The major examples of 'established lawyers' are in Alberta, British Columbia and Quebec.

There has been some move towards the normalization of the Indian specialization within the legal profession. Indian legal questions are now widely recognized as real legal questions by judges and practicing lawyers. Major cases in the 1960's and 1970's have generally clarified the questions of Indian and Inuit hunting and fishing rights. Cases are presently underway on the taxation of Indians, on the application of provincial laws on reserves and on government management of Indian assets. Indian cases are now a regular occurrence in the law reports. A Canadian Native Law Bulletin is published in the west. Native rights courses are a regular part of the curriculum at many law schools. The sharp division between 'newcomers' and 'established lawyers' has become muted, at least in the cases of particular individuals. Indian lawyers, now starting practice, do not fit into either category.

THE RESOLUTION OF CLAIMS

In 1969 there were no satisfactory models to follow if there

were to be settlements of major Indian land claims. The treaties could not be repeated with any sense of integrity. Virtually all non-Indians had a strongly negative image of reserves. A U.S. style Indian claims commission was being advocated in Canada, but soon came to be rejected both by the government and by the Indian organizations. New Zealand was occasionally held out as a shining model, but no one seemed to know either what they did or why it worked. Only the Alaska settlement of 1971 and the nationalities policies of the socialist countries suggested what might lie ahead, and neither were models that could easily be applied in Canada.

The legal and political acceptance of native claims has required Indian and Inuit groups to cope with the problems of settling land claims. It has been accepted, without question, that the burden of proposing the specific resolution of claims falls on the native groups. The federal government has played almost no role in proposing the form for a resolution of claims. Equally the commissions of inquiry which have been active in the last few years have avoided any suggestions of the form land claims settlements should take. It will be argued that it is time for governments and commissioners to listen to native groups and not simply play the role of more enlightened colonial administrators. But it is important to recognize the burden this process has placed on native organizations. These bodies have relatively short histories and a mixed experience with lawyers and other consultants. The task involved as clearly proven very difficult. Only this can explain the internal political upheavals within the Indian organizations in Quebec, for the Dene, the Inuit and the Indians of the Yukon, in each case during a period of the assertion or negotiation of a claim. This explains the relative

calm of the Indian claims situation today and the fact that the James Bay settlement is not so much a precedent as an anomoly.

We have entered into a period in our national history of an internal national expansion into the northern areas, which, until now, we have regarded with little interest. The expansion is prompted by energy needs. The two major comprehensive settlements, in Alaska and James Bay, both result directly from energy projects. Native land claims have gone from obscurity to detailed documentation in the Northwest Territories because of the pipeline proposal. It is in the north, in this period, that the dynamic of Indians and lawyers and Indians and law is under most pressure. The conflicts are on a grander scale than in the rest of Canada. There are possibilities of a better deal. We could do something more imaginative or more just. At least, we could have settlements arising out of real negotiations and discussions between Indians and whites.

Let us look at the record so far.

(a) James Bay

When Premier Robert Bourassa announced Quebec's intention to proceed with the massive James Bay Hydro-electric project, there was no governmental concern with native land claims. James O'Reilly was already established in Indian work for the Indians of Quebec Association, whose constituency included the Cree of James Bay. Initial sessions with representatives of the Quebec government made it clear that no significant offer of settlement would be made. The Cree wanted certain modifications to the project. The government replied that the project was completely non-negotiable. This left no alternative but to go to court. A major court case

is threatening to most political leaders, Indian or non-Indian. Politicians prefer compromise to the all or nothing risks of litigation. With some apprehension, the leadership authorized the law suit.

The hearing for the pre-trial injunction was long and expensive. the actual hearings took six months and involved a staggering number of Indian and non-Indian witnesses. The suit was against provincial agencies and, while it named the federal government as a party, Ottawa was able to maintain an arms length position of "alert neutrality". It balanced its loyalty to the Bourassa regime and its responsibilities to the Indians by permitting the Indians to handle the case on their own, but with the use of federal grants and loans. The Indians of Quebec Association assumed both political and financial risks in the process.

Initially there were attempts to link together the aboriginal title claims of the Indians of southern Quebec with the claims of the Cree and Inuit of northern Quebec. This failed tactically and legally. It was not accepted either by the Quebec government or by Mr.Justice Malouf in the litigation. The strains of the litigation resulted in a splitting of the Indians of Quebec Association and the pursuit of a separate settlement for the Grand Council of James Bay Cree and the Northern Quebec Inuit Association. The split became public. Andrew Delisle, the head of the Indians of Quebec Association, named a priest, a lawyer and a politician as having sold out the Cree of James Bay. The lawyer was, of course, James O'Reilly. The politician was a crucial figure, John Ciaccia, member of the Quebec National Assembly and chief negotiator for the Quebec Government. John Ciaccia had moved from private practice to become Assistant Deputy Minister

in the Department of Indian Affairs in 1971. He was an 'established lawyer' drawn into Indian legal work on the side of the government. He was the Department's liaison with the Indians and Inuit during the court case and attempted to work out the basis for a settlement. In 1973 he ran in the Quebec provincial election for the Liberal party. Shortly after Mr.Ciaccia won his seat, Mr.Justice Malouf granted the pre-trial injunction and ordered a halt to the James Bay project. This jolt led the Quebec government to accept the need for a negotiated settlement. While the moment was opportune, it was still likely that defeat would be snatched from the jaws of victory. A very difficult period of negotiations lay ahead. John Ciaccia has listed about a dozen Quebec government departments or agencies which were involved in some aspect of the settlement. It fell to Ciaccia to keep them all relatively happy and still produce a settlement. It fell to James O'Reilly to convince his constituency that the project could not really be stopped and that the enormously complicated settlement was in their best interests. It fell to the counsel for the Inuit to accomplish the same goal with the Northern Quebec Inuit constituency.

The configuration of John Ciaccia for Quebec, James O'Reilly for the Cree and John Lemiex for the Inuit was striking. They were three 'established lawyers' able to endure an enormously demanding sequence of negotiations. Lemieux reported that at the peak of the negotiations ten to twelve members of his law firm were working full time on the claim. I do not mean to suggest that the native leadership played no role. There was a young leadership for the Inuit and the Cree who were clearly involved throughout the process. But one only has to start to read the final agreement to know, without question, that it is the product of lawyers. It is

not a document which could be communicated in its detail to northern Indians and Inuit. It makes one wonder how we have been able to get along for so many years with a document as short and simple as the Indian Act.

(b) The Dene

The Dene of the Northwest Territories faced two particular problems. The battle to retain special status had almost been lost in the Northwest Territories before the Indian Brotherhood was even formed. Secondly they lived in a treaty area. Their people said that treaties 8 and 11 were treaties of peace and did not deal with land. But the treaties said they extinguished all Indian land rights in the region. The federal government relied on the treaties. The Dene had to build a credible case for their view of the treaties or accept what would clearly have been an inadequate and inappropriate settlement. This involved extensive field work and complex historical research. The staff lawyer of the Indian Brotherhood was involved but the primary reliance was on non-legal skills and non-legal workers. The Indian Brotherhood of the Northwest Territories has relied on a wide range of outside consultants. They have used social scientists more than lawyers. Their major claims document is the "Dene Declaration" which speaks of decolonization and poses analogies to the third world. It is not a document that would have been prepared by lawyers. No negotiations comparable to those for James Bay have ever begun in relation to the Dene claims.

In 1973 the Brotherhood decided to try to protect the Dene position by filing a caveat in the land titles office in Yellowknife. The caveat claimed aboriginal rights against all ungranted lands in the Mackenzie

District south of the delta. It was referred to the Supreme Court of the Northwest Territories and a court case was underway. A rather disparate group of lawyers was assembled by the staff lawyer of the Brotherhood for the purposes of the case. The law suit advanced the credibility of the claim, but had no role comparable to the James Bay litigation. The pipeline was still distant in time, making the suit, at most, a warm-up skirmish.

The real forum proved to be the Berger hearings. The pattern of reliance on non-legal consultants continued in that context and the range of southern white experts used by the Brotherhood was impressive. But while the hearings proceeded, the Brotherhood went through a period of internal political crisis which left their participation in the inquiry largely in the hands of non-native staff. The significant lawyers on the scene were those involved with the Berger Inquiry, including Mr.Justice Berger still playing his 'publicist' role, now with the aid of an 'established lawyer' as staff counsel and a 'newcomer' lawyer responsible for liaison with the Indian communities. The lawyers, working within the constraints of the Inquiry process, advanced the legitimacy of the Dene claim immeasurably. But the Brotherhood had been traumatized by the leadership dispute. After that appeared to have been resolved, the threat associated with the pipeline vanished. It has appeared that the possibility of a comprehensive settlement of the Dene claims has been lost. Settlements do not occur without external pressure and they cannot be accomplished without negotiators. Neither exist today in the Northwest Territories. In late November, 1977, George Erasmus, the President of the Indian Brotherhood announced the termination of five non-Indian staff including the staff lawyer. He said "A land claims settlement at the present time seems remote". In September, 1978, the Minister

of Indian Affairs suspended land claims funding "because of the lack of substantive progress by the Dene and Metis leadership during the past two years to agree on a mechanism for conducting joint negotiations with the federal government over their overlapping land claims."

(c) The Inuit

The Inuit have acted separately from the Indians, but clearly somewhat in the shadow of the developments on the Indian scene. In the James Bay litigation they were separately represented and the final settlement is, in fact, two agreements with differing terms for Cree and Inuit. The Quebec claim was handled by the Northern Quebec Inuit Association. The national body, Inuit Tapirisat of Canada, has land claims responsibility only in the Northwest Territories.

The Inuit organization began with heavy reliance on outside consultants, both legal and non-legal. Their land claims document, Nunavut, was primarily authored by lawyers. Unfortunately, the gap between the Inuit constituency and the government constituency was not bridged, and the Inuit withdrew the Nunavut proposal after it had been presented to government on the basis that it was insufficiently understood at the community level. This sequence involved serious political problems within the organization and led to a split within the Northwest Territories. The Committee for Original People's Entitlement in the Mackenzie Delta were a less isolated group than the Inuit communities of the eastern Arctic. They felt under considerable pressure because of the possible Mackenzie Valley pipeline. For these reasons they separated their land claims activities from those of the

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national organization and presented a separate claim to the federal government. A draft settlement has been agreed to, copying some of the major innovations of the James Bay settlement. Because of the existence of the Drury inquiry into the political evolution of the Northwest Territories, the draft settlement does not deal with political or jurisdictional structures in the region.

In the spring of 1978 a confrontation loomed between the Inuit of Baker Lake and the federal government over seismic exploration in the region around the village. The new leadership of Inuit Tapirisat came from Baker Lake and, in spite of the fact that land claims questions had been separated from the political organization, the leadership authorized a federal court action to stop the federal action. A 'newcomer' lawyer involved senior counsel to handle the key court work. The result was a successful invocation of the courts in a situation where negotiation seemed to have broken down.

Negotiations to settle the Inuit claims to the central and eastern arctic have officially begun, but Inuit Tapirisat have objected to the federal government separating the political or jurisdictional aspects of the claim from the other elements (which occurred when the Drury Inquiry was established). That problem has prevented any real progress to date.

(d) The Yukon

The Yukon Native Brotherhood, under Elijah Smith, presented a land claims proposal to the federal government in February, 1973. The document was an Indian document, which emerged from extensive consultations and discussions in the Indian communities. The presentation was a success

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and the Federal government agreed to begin negotiations to settle the claim.

Elijah Smith, his lawyer Alan Lueck, the executive director of the Native Brotherhood, the Indian Claims Commissioner Lloyd Barber who financed the preparation of the claim and the federal cabinet ministers who received the claim were all known to be members of the Liberal party. In contrast, a unifying element in Yukon territorial politics was opposition to Ottawa which commonly meant opposition to the Liberal party as well. The preparation and presentation of the claim had carefully and successfully exploited national political forces while taking the necessary risk of antagonizing local political interests.

Alan Lueck had done some Indian legal work in Saskatchewan before moving to the Yukon in 1969 or 1970. Lueck established his own law firm in Whitehorse. Subsequently he practiced on his own, doing exclusively Indian work. He maintained an office in the Whitehorse Indian Centre, which housed the offices of the Yukon Native Brotherhood, the Yukon Association of the Non-Status Indians and the joint land claims body, the Council for Yukon Indians. Perhaps more than any other lawyer, his primary role appeared to be political and tactical advice.

In 1976 certain confidential documents from the land claims negotiations were leaked and publicly criticized by the head of the National Indian Brotherhood. Under pressure Elijah Smith resigned as president of

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of the Yukon Native Brotherhood. After Smith's departure, Lueck found that his advisory role was sharply diminished.

Lueck apparently favoured the Alaska Highway route for the natural gas pipeline from Alaska. In a speech Lueck wrote, Elijah Smith supported that route in testimony to the Berger Inquiry. In the spring of 1977 Lueck negotiated the appointment of Kenneth Lysyk to chair the inquiry into the Alaska highway route, committing the Council for Yukon Indians to participation in the inquiry and, in fact, facilitating the eventual selection of the Alaska highway route. His apparent support of the pipeline put him in conflict with the stated position of the Council for Yukon Indians.

In July, 1977, Lueck wrote to the Board of Directors and the members of the General Assembly withdrawing his services. He complained that he was being by-passed in policy formation and suggested that the C.Y.I. was not taking advantage of the "present political and economic situation in the Yukon and Canada..." He recommended that a General Assembly be held and that "older, mature" community leaders should attend as delegates, rather than the "young and inexperienced" people sent in the past. He said that the head of the C.Y.I. was too inexperienced to lead the organization. Lueck's letter became public and he gave a press conference and was interviewed on local radio, repeating the criticisms. The territorial legal affairs department charged Lueck with unprofessional conduct, but the charges were dropped at the request of Commissioner Pearson, a personal friend and a federal appointee. The Commissioner later testified that he feared that the charges against Lueck might be construed by the C.Y.I. as an interference

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in their internal affairs, complicating the already difficult land claims negotiations. The Territorial Council was not satisfied with the withdrawal of charges and passed an ordinance which would have given them authority to establish commissions of inquiry, intending to establish an inquiry into the matter. On Ottawa's instructions, Commissioner Pearson vetoed the ordinance, but with the compromise that Pearson, himself, would establish an inquiry into the affair. The Inquiry reported in May, 1978, that Pearson had made errors of judgment, but had not been guilty of any breach of duty.

Lueck was an 'established lawyer' who successfully managed the political moves involved in the preparation and presentation of a land claim. He acted as one of the main negotiators of the claim until negotiations broke down in the face of external criticism. He viewed the possibility of a pipeline as an opportunity to be seized, not a threat to be opposed. He involved the Indian-organizational client in a process which was leading towards the pipeline, in spite of the fact that the client was publicly hostile to it. The organization became increasingly unwilling to follow his advice, or, apparently, even consult him. He attempted to very directly influence the organization by attacking the current leadership. When that attack became public he repeated his critique, an action which was challenged by territorial officials and politicians and not by his Indian clients.

Lueck faced many problems that had not been present in James Bay. He did not have strong negotiators on the other side, either for the territorial or federal governments. There was little external pressure for

settlement. Even when the shift of pipeline route seemed to create external pressure, it occurred too quickly and during a period of organizational disunity and was not exploited by the Indian organization. His role as major tactition on the Indian side was exposed, allowing local political forces hostile to the liberal party and to the federal government to exploit the situation for reasons which had little to do with Lueck himself. In many ways it is the kind of story that could only have happened in the highly political atmosphere of the Canadian north. The settlement of the claim has been stalled again, though another set of negotiations seem about to begin.

CONCLUSIONS

In the years after the second World War, it appeared that the Canadian state was prepared to respond to the marginalized Indian and Inuit populations as particular poverty groups. But the political position of the Indian and Inuit organizations which developed in the period stressed distinct group survival, legal rights and special status, rather than economic need or equal treatment. The courts, as a result of initiatives by the 'publicist' lawyers in the 1960's, gave increased legal credibility to Indian claims, strengthening the political case for special status.

As a major policy initiative to involve Indian and Inuit groups in mainstream Canadian political life, the federal government began funding native political organizations in 1969, a policy still in place ten years later. The new organizations hired the 'newcomer' lawyers. This was in a period which saw the emergence of 'poverty law', 'storefront legal offices'

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and the wild garden of war on poverty legal programs in the United States. Law and lawyers were being held out as a general panacea in non-Indian society. This context made young lawyers more willing to become involved with the Indian organizations. It was all highly experimental, but it was not a planned experiment. In the years after 1969 a pattern developed of both 'newcomers' and 'established lawyers' working for native organizations in Canada.

The use of law and lawyers has had less of an integrating effect on native communities than most non-Indians would have expected. Legal arguments and lawyers have often been used in ways that were not familiar to non-Indians. Their use did not end Indian symbolic competition as a major political strategy. In some limited situations they have clearly worked within the system using lawyers, litigation and negotiation in the hope of obtaining a better deal within Canadian society. The main achievement, the James Bay and Northern Quebec Agreement, has been very controversial and has been criticized by virtually all native spokespeople outside northern Quebec. Noel Starblanket, expressing his opposition to the James Bay agreement, stressed his distaste for "compromise", which the James Bay settlement most certainly represents.

The infusion of money and the presence of lawyers has not created native organizations which are regular parts of the Canadian political process. While some political accomodation has occurred the need for special responses to native collectivities has, in fact, been reinforced.

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